fore be fixed upon the same principles which, in the absence of assignment, would have governed during the debtor's life-time. Accordingly it is submitted that the moment when the creditor elects to rely no longer on his security alone, but to stand on his double right, and presents his claim against the personal liability of the obligor, should be determinative of the amount of the debt upon which the creditor may found his demand for dividends. Prior to that time his acceptance of the proceeds of his security is a voluntary reduction of the debt; after that moment, to consider it to be the same would be a violation of his right to rely on two separate and distinct assurances, the security in his possession, and the debtor's personal liability.[11]

BURDEN OF LOSS UNDER SPECIFICALLY ENFORCEABLE CONTRACTS OF SALE.—At law a vendor's rights against his vendee cease to exist if the subject-matter is destroyed or so substantially altered while the contract is still executory as to render performance according to the terms of the agreement impossible.[1] This naturally results from the consensual character of a contract. It would seem that in equity the same result should be reached, since the conception of specific performance excludes the notion of dispensing with performance on the part of either party. It is not enforcing the contract to permit the vendor to recover the purchase money without doing what he agreed to do. Equity and law should take the same view as to what constitutes performance; for a contract is defined not by law but by the parties, and the determination of its terms is accordingly a question of fact. Nevertheless the decided preponderance of authority is in accordance with *Nixon* v. *Marr,* (1911) 190 Fed. 913, in which case it was held that the vendee must accept, without compensation, property to which a loss had occurred between the formation of the contract and the time for performance.[2] This surprising result is clearly due to the fact that the vendor under a specifically enforceable contract is regarded in equity as a trustee for the vendee,[3] who, as *cestui que trust,* is the equitable owner of the property.[4] Hence the law of trusts in general determines rights acquired

[11]Erle *v.* Lane (1896) 22 Colo. 273; but see Morton *v.* Caldwell (S. C. 1849) 3 Strobh. Eq. 161, 164, overruled in effect in Wheat *v.* Dingle (1889) 32 S. C. 473. In some jurisdictions by statute real estate has been made the primary fund for the discharge of the mortgage debt, at least where there is a sufficiency of assets. See Hauselt *v.* Patterson *supra.*

[1]Wells *v.* Calnan (1871) 107 Mass. 514.

[2]Paine *v.* Meller (1801) 6 Ves. Jr. 349; Cass *v.* Rudele (1692) 2 Vern. 280; Brewer *v.* Herbert (1868) 30 Md. 301; Robb *v.* Mann (1849) 11 Pa. 300. But see *contra,* Gould *v.* Murch (1879) 70 Me. 288; Thompson *v.* Gould (Mass. 1838) 20 Pick. 134; Wilson *v.* Clark (1880) 60 N. H. 352. Until recently the law seems to have been in doubt in New York. See, on the one hand, McKechnie *v.* Sterling (N. Y. 1867) 48 Barb. 330; Gates *v.* Smith (N. Y. 1846) 4 Edw. Ch. *702, and, on the other hand, Smith *v.* McClusky (N. Y. 1866) 45 Barb. 610; Wicks *v.* Bowman (N. Y. 1874) 5 Daly 225; Listman *v.* Hickey (N. Y. 1892) 65 Hun 8, affirmed without opinion (1894) 143 N. Y. 630. But the loss seems definitely to be placed upon the vendee by Sewell *v.* Underhill (1910) 197 N. Y. 168.

[3]Pomeroy, Eq. Jur., (3d ed.) § 1406.

[4]Brewer *v.* Herbert *supra;* Robb *v.* Mann *supra;* Pomeroy, Eq. Jur., (3d ed.) § 1406.

under the contract,[5] and accordingly the rule of purchaser with notice applies in favor of the vendee[6] and upon his death his interest passes to his heirs.[7] Consequently the conclusion is reached that, like any other *cestui que trust,* the vendee must bear accidental loss occurring to the trust *res;* and that is taken to mean that despite such loss he must pay the purchase price.[8]

But it is submitted that this result is erroneous. If, indeed, from the hypothesis that the vendee is in the ordinary sense equitable owner of the property it must follow that he is liable for the purchase price even though the subject-matter of the contract is destroyed, the reasonable conclusion is that he is not equitable owner in the ordinary sense, but to some qualified extent. Even if vendor and vendee are in some sense trustee and *cestui que trust,* yet the relationship is the result of a contract which can be specifically enforced. Therefore the trust exists only because the contract causes it to exist. To say that the contract must be performed *in specie* because there is a trust is to invert the true state of affairs and substitute cause for effect. Accordingly it is irrational to reach a result inconsistent with the contract through a trust which is its creature. Rather the trust must conform to the intention of the parties as embodied in the contract.

To regard the question from another angle, it does not follow from the fact that the vendee is a *cestui que trust,* and must consequently bear the loss of the trust *res,* that he must pay the purchase price to a vendor who cannot perform. The statement that a *cestui que trust* must bear losses occurring without fault of the trustee evidently means, that though he has lost his equitable estate he cannot hold the trustee responsible. Similarly, in the case of vendor and purchaser, if the subject-matter of the contract is destroyed, the latter loses his equitable estate, and the vendor is not on that account responsible to him. Clearly, then, the law of trusts does not call upon the vendee to pay. If he is bound to pay, it must be owing to his contract obligation. But if he is bound as a matter of contract to pay, it must be on the theory that the vendor has performed. In other words, equity not only deems him a trustee, but regards the trust obligation as his sole obligation, arguing that since the trustee is not to blame for the loss he is not in default, and since the vendor —that is to say, the trustee—is not in default, it follows that the vendee must fulfill his obligation. But this view assumes that because the vendor is a trustee he is released from his promise to convey certain agreed property, and is accordingly fallacious; there is nothing in the nature of the trust obligation which excludes that imposed by the contract. Neither can the vendee be bound to pay over the purchase money as trustee thereof, because there is no trust *res.* The duty to pay the purchase money was a legal duty, enforced in equity

[5]See Keener, Burden of Loss, 1 COLUMBIA LAW REVIEW 1.

[6]Daniels *v.* Davison (1811) 17 Ves. Jr. 433; Lovejoy *v.* Potter (1886) 60 Mich. 95.

[7]Langford *v.* Pitt (1731) 2 P. Wms. *629. For an enumeration of cases where equity applies the law of trusts to the rights of vendor and purchaser, with citations, see Keener, Burden of Loss, 1 COLUMBIA LAW REVIEW 1.

[8]1 COLUMBIA LAW REVIEW 1; Pomeroy, Eq. Jur., (3d ed.) § 1406; Brewer *v.* Herbert *supra.*

simply in compliance with the theory of mutuality,[9] a doctrine inapplicable where the contract can no longer be specifically enforced on behalf of the vendee.[10] Accordingly it seems that on principle the same rule should be applied as in cases where for other reasons the vendor cannot do his part, namely, that a vendor must perform substantially before he can maintain his bill for a specific performance.[11]

ENFORCEMENT OF OBLIGATION IMPOSED UPON THE OWNER OF REAL PROPERTY IN VIRTUE OF A FOREIGN JUDGMENT OF DIVORCE.—A novel set of facts is presented in the recent case of *De Graffenried* v. *DeGraffenried* (1912) 46 N. Y. L. J. No. 80. The plaintiff, a citizen of New York, married the defendant, a Swiss citizen, in France, the matrimonial domicil being Switzerland. Eventually the defendant brought suit for divorce in a Swiss court of admitted jurisdiction, but on a cross-bill being filed by the plaintiff she obtained the divorce. Subsequent to the marriage and before the divorce, the plaintiff purchased New York real estate in her own name, and conveyed to her husband, without consideration but by full covenant and warranty deed, the undivided half-interest therein sought to be recovered in this suit. No disposition of this land was made in the divorce decree, but under Swiss law the party against whom a divorce is granted must return to the other party all property acquired from the latter in any manner during coverture. The general rule is elementary that law of the matrimonial domicil will ordinarily govern the rights of the parties to a foreign marriage, as to their existing property in that place and as to all personalty everywhere, while as to immovables the *lex loci rei sitae* is controlling,[1] in the absence of any contract subjecting their realty to a different law, and it further seems clear that the parties here cannot be deemed to have made a tacit contract with reference to the community laws of France or Switzerland,[2] for in that event the conveyance of the half-interest would have been superfluous. Clearly then, the *lex sitae* prevails, and the defendant holds the title to this land, upon which the *lex domicilii* can of course have no extra-

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[9]Withy *v.* Cottle (1823) 1 Sim. & S. 174; Adderley *v.* Dixon (1824) 1 Sim. & S. 607. Similarly specific performance will not be decreed at the instance of one party unless the other could have maintained a bill. Norris *v.* Fox (1891) 45 Fed. 406; Hills *v.* Croll (1845) 2 Phillips 60.

[10]Nor need such a result attend the fact that the vendee might insist on the vendor's performance so far as it lay in his power to perform, as if a vendee who had contracted for a house and lot should demand the latter after the former had burned. Such a case could well be treated as are those where the vendor has contracted to convey more than he has or can procure. There the vendee can compel the vendor to perform so far as he can, but the vendor can maintain no bill if the vendee declines to go on. Barnes *v.* Wood (1869) L. R. 8 Eq. *424; Cleaton *v.* Gower (1674) Finch 184; Perkins *v.* Ede (1852) 16 Beav. 193.

[11]Dyer *v.* Hargrave (1805) 10 Ves. Jr. 505; Perkins *v.* Ede *supra.*

[1]Dicey, Conflict of Laws, (2nd. ed.) 500, 510, 512, 529. It is to be noted that even express contracts will be held invalid if they are prohibited by the law of the place where they are sought to be enforced. Story, Conflict of Laws, (8th ed.) 267.

[2]See French Code, § 1402.